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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 186

LOUIS BLUMENSCHEIN, MADELINE C. LYON, ELIZABETH REED, WILLIAM QUIGLEY, as Taxpayers of the City of Pittsburgh and as Chairman, Vice-Chairman, Secretary and Treasurer, Respectively of the North Side Protest Committee, an Unincorporated Association, on Behalf of Themselves and All Other Persons or Taxpayers Similarly Affected, Appellants,

v.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, a Corporation

MOTION TO DISMISS

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MOTION TO DISMISS

The Appellee in the above entitled case, in support of its Motion to Dismiss respectfully show the following:

I. COUNTER-STATEMENT OF CASE

Appellants filed a Complaint in Equity in the Court of Common Pleas of Allegheny County to enjoin appellee from taking any of the land located on a certain site selected by appellee for a low-rent public housing project. On hearing of the case, the Chancellor dismissed the Complaint. Exceptions were taken by the appellants and after oral argument, were dismissed by the court en banc. Appellants then appealed to the Supreme Court of Pennsylvania which court affirmed the Decree of the

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Court of Common Pleas of Allegheny County, whereupon appellants now seek to appeal to this Honorable Court.

On August 17, 1949, the Appellee passed a resolution authorizing the execution of a formal application to the Public Housing Administration to reserve 5,000 dwelling units of low-rent housing and for a preliminary loan in the amount of $650,000 to cover the cost of surveys and planning in connection with the development of the program. The application declared a need for low-rent housing in the City of Pittsburgh which was not being met by private enterprise and contained information required by the Public Housing Administration in order to guide it in determining the need of Appellee as compared to the need of other local housing authorities. The City of Pittsburgh, County of Allegheny, the School District of Pittsburgh and the County of Allegheny Institution District each passed resolutions authorizing the execution of Cooperation Agreements with the Housing Authority of the City of Pittsburgh, Appellee herein. The Agreement with the City of Pittsburgh provided that the City would furnish certain municipal services, aid in an equivalent elimination program, and make such changes in zoning as were reasonable and necessary; it provided, also, for payments by the Appellee in lieu of taxes. For eighteen months prior to the filing of the application, Appellee had been studying possible sites on which public housing could be constructed. After studying in detail twelve possible sites for projects, the Authority approved three sites including the site now involved in litigation. The Appellee caused topographical property line and utility surveys to be conducted on this site, whereupon the Appellants anticipating that the properties of the residents residing within the site would be condemned

for purposes of the project, filed their Complaint seeking to enjoin the Housing Authority of the City of Pittsburgh from taking any further action in the matter.

II. APPELLANTS REMEDY, IF ANY, IS A PETITION FOR WRIT OF CERTIORARI AND NOT APPEAL.

The statutory provision relied on by Appellants, does not sustain the jurisdiction of the United States for the reason that it is not in conformity with the *Act of June 25, 1948 c 646, 62 Stat. 929, 28 U.S.C.A. 1257,* which reads as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:

> "(1) By appeal where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Neither of the above quoted sections is applicable to the questions presented in this case and none of the cases cited by appellant in support of jurisdiction applies to this case. The Hammerstein case, cited by Appellants, was a case in which final judgment had not been secured by the highest court of California, and all of the other cases involved the constitutionality of State statutes.

III. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE ATTEMPTED APPEAL.

Appellants have presented the following questions:

(a) Where the United States Housing Act of 1937, Sec. 10, requires a contract between the local governing body and a Housing Authority whereby it is undertaken to eliminate slum units equivalent to low rent housing units to be constructed, and no such contract has been entered into or is of record, may the United States Public Housing Administrator approve the construction of a low rent housing project?

(b) Where the United States Housing Act of 1937, 42 U. S. C. A., Sec. 1401, declares the policy of the United States "to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions", and Sec. 1410 specifically provides that for each unit of construction a slum must be eliminated, may a State Supreme Court waive the requirements for elimination of slums in approving the construction of low rent housing projects with Federal aid?

(c) Where a Zoning Ordinance prohibition exists against multiple dwelling unit construction as contemplated in a low rent housing project, may a City Council, in violation of and without proceedings to change the said Zoning Ordinance, enter into "cooperation agreements" with the United States Public Housing Administrator for preliminary loan and program reservation for 5000 low rent dwelling units, including the 1984 units contemplated in the area here involved (it having been declared that a Zoning Ordinance is a

contract between the local government and a private property owner)?

(d) Where a State Supreme Court makes a nisi prius interpretation of the United States Housing Act, which involves the expenditure of extensive Federal Funds by the United States Public Housing Administrator, should the said interpretation be reviewed insofar as it affects the United States Constitution, statutes and funds?

(e) Where a Public Housing Authority under State and Federal law, declares a "need" for low rent housing and selects a first class residential area for the site of a contemplated public housing project, where other slum areas and undeveloped areas are available; where considerable grading and condemnation costs will extensively add to the total cost of the said project; and where no public hearings have been held for the determination of "need" or the selection of site; is the taking of private property a violation of the 5th and 14th Amendments of the Federal Constitution and of the United States Housing Act of 1937, as amended?

These questions presented by Appellants are not properly raised for the reasons that they are new to this case. Neither question (a) nor question (b) was raised by Appellants in their appeal to the Supreme Court of Pennsylvania nor were they raised in their notice of appeal to this Honorable Court. The questions not being raised below, it is proper that no rulings were made thereon. The presenting of these questions at this time is untimely and they should not be considered. The statute involved in these questions is Section 10(a) of

the United States Housing Act of 1937, as amended by the Housing Act of 1949, (42 U. S. C. A. Sec. 1410(a)) which provides in part as follows: * * * "The Administration shall not make any contract for loans (other than preliminary loans) or for annual contributions or for capital grants pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, unless the governing body of the locality involved has entered into an agreement with the public housing agency providing that, subsequent to the initiation of the low-rent housing project and within five years after the completion thereof, there has been or will be elimination, by demolition, condemnation, effective closing, or compulsory repair or improvement, of unsafe, or insanitary dwelling units situated in the locality or metropolitan area substantially equal in number of newly constructed dwelling units provided by such project: Provided, however, That where more than one family is living in an unsafe or insanitary dwelling unit the elimination of such unit shall count as the elimination of units equal to the number of families accommodated therein: Provided further, That such elimination may, in the discretion of the Administration be deferred in any locality or metropolitan area where there is an acute shortage of decent, safe, or sanitary housing available to families of low income". An examination of the record will reveal that the only application for a loan made by Appellee was an Application for a Preliminary Loan, which application was introduced by Appellee, as defendants "Exhibit A" and which application is referred to by Appellants in their Jurisdictional Statement (page 5) and by Chief Justice Stern in his opinion which is printed in the Jurisdictional State-

ment (appendix A, page 21). The Statute, above quoted and relied on by Appellants specifically excludes "Preliminary Loans" from its provisions. Nevertheless Appellee did conform to the provisions of the Statute and entered into a Cooperation Agreement with the City of Pittsburgh in March of 1950, which agreement was introduced into evidence as defendants Exhibit "B". The agreement contains the requirements of the section of the United States Housing Act quoted above as noted in the 17th Finding of Fact of the Chancellor (Record, Page 56a). The Chancellor also concluded in his 7th Conclusion of Law that "The Cooperation Agreements between the Housing Authority of the City of Pittsburgh and the various taxing bodies were valid, being authorized by the proper governing bodies of the Authority and the local taxing bodies. (Record, page 84a) From this 17th Finding of Fact and 7th Conclusion of Law the Appellants did not appeal to the Pennsylvania Supreme Court. (See questions involved, page 1, and Summary of Argument, page 6, of Appellants Brief to the Supreme Court of Pennsylvania.) Appellants argument that the Pennsylvania Supreme Court waived the requirement for elimination of slums is not supported by any evidence. In fact the Court noted the finding by the Chancellor that "the Housing Authority of the City of Pittsburgh has in fact eliminated a number of sub-standard dwelling units equal to the number of new units it has built, as required by the United States Housing Act." (Jurisdictional Statement pages 29 and 30)

Question C is also unsubstantial, and was not argued or pursued before the Pennsylvania Supreme Court. In the first place, the question contains an error of fact. The City of Pittsburgh, at no time, entered into a Co-

operation Agreement with the United States Public Housing Administration, nor does the United States Housing Act nor any federal regulation of the Public Housing Administration require a contract between the local governing body and the Public Housing Administrator. A Cooperation Agreement was entered into between the City of Pittsburgh and Appellee and Section 5(c) of said agreement provides as follows: The City shall—"(C)" Insofar as the City *may lawfully do so,* grant such waivers of the building code of the City as are reasonable and necessary to promote economy and efficiency in the development and administration of such Project and make such changes in any zoning of the site and surrounding territory of such Project as are reasonable and necessary for the development and protection thereof." An examination of Appellant's Brief filed with the Pennsylvania Supreme Court reveals that he argued four questions summarized as follows:

1. Defendant's "discretionary" actions are reviewable.

2. The declaration of a need for low rent public housing was not based upon proper inquiry, investigation, hearing or evidence and should be set aside as capricious and arbitrary.

3. The selection of an admittedly high-class residential area containing no slums or blight when other more suitable and undeveloped areas were available, without public hearing and without formal findings of fact, was arbitrary and capricious and an abuse of discretion, and should be set aside by the Court.

4. The manner of selection of the site is at odds with the legislative purpose and involves an unconstitutional usurpation of power.

Appellant's question C is not included nor incidental to any of these issues nor was the question disclosed in the brief of Appellants or argued orally by counsel for Appellants before the Pennsylvania Court. Even the dissenting Justice did not consider this question. Not having raised this question before the Pennsylvania Supreme Court, it is not a timely question for this Court. Appellant's questions D and E are without substance. The Court below made no interpretation of the United States Housing Act but merely decided (1) The Appellee was not arbitrary and capricious in declaring a need for low-rent housing in the City of Pittsburgh (2) That Appellee did not abuse its discretion in selecting the site in question for a public housing project and (3) That the construction of low rent housing is not limited to slum areas. As to the question of expenditure of federal funds, it is well settled from the line of cases following Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597, 67 L Ed. 1078; that individual taxpayers of the United States are not proper parties to raise questions of expenditures of federal funds.

Appellants contention that they were deprived of due process of law by Appellee's failure to hold public hearings is in error. This Court has passed on this question in Rindge Co. v. Los Angeles, 262 U.S. 700, 709, 43 S. Ct. 689, 693; 67 L Ed. 1186 (1953) (see also Robinette v. Chicago Land Clearance Commission 115 F. Supp. 669 (1951); Robinette v. Campbell 261, 342 U.S. 940. When, and if, condemnation proceedings are instituted against

the properties of the Appellants, they will have an opportunity to be heard on all questions to which they are entitled to a hearing under the steps required to be taken precedent to the right of the exercise of the power of eminent domain.

IV. CONCLUSION

All of the questions relating to this case and raised before the Pennsylvania Supreme Court were decided upon adequate state grounds.

Wherefore Appellee respectfully submits this statement showing that the questions upon which the decision of this cause depend are so unsubstantial as not to need further argument and Appellee respectfully moves the Court to dismiss this Appeal or, alternately, that the judgment of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

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